IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 303 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ALEFKHAN NIYAZKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR BM GUPTA for Petitioners

MR ND GOHIL ADDL. PUBLIC PROSECUTOR for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 16/03/2000

ORAL JUDGEMENT

1. This is an application u/s 401 of the Criminal Procedure Code wherein the applicants are original accused, invoking the discretionary powers of this Court.

2. The applicants herein were charged with the commission of offence punishable u/s 7, 12, 13[i] [d] I, II, III read with section 13 of the Prevention of Corruption Act, 1988, which was ultimately registered as Special Criminal Case No.23/1993 in the Court of learned Special Judge, at Ahmedabad.

The charge was framed on 1st December 1993. Upto April 1997, the case was not proceeded with and no witnesses were examined. It is however an admitted fact and on record that the accused preferred amongst other applications, an application exh.7, the hearing of which took considerable time, and was ultimately rejected by the Special Judge. The accused challenged the said order in the High Court, and the High Court also took some time to dispose of this proceeding. This continued upto 14th July 1998. Thereafter, when the special case was taken up, the accused has sought time.

It was only on 8th December 1998 that the accused gave an application exh.18, invoking the principles laid down by the Supreme Court in the two decisions of Raj Deo Sharma v/s State of Bihar, reported in J.T. 1998 [7] SC page 1 and J.T. 1999[7] SC page 317, on the basis of which the accused prayed that the prosecution evidence be closed and the accused be acquitted.

3. There cannot be any serious controversy as to the principles laid down by the Supreme Court in the aforesaid two decisions. Broadly speaking, the Supreme Court has laid down that if there is undue and unexplained delay in conducting the prosecution evidence and in recording the prosecution evidence, for the various reasons laid down by the said decision, the rights of the accused, as also the constitutional rights of a person, would be adversely affected, and that therefore, it would be appropriate to direct the closing of prosecution evidence under the specified circumstances. No doubt, the same decision lays down the exception to the general rule. That the decision also lays down by way of guidelines the various other parameters which will be required to be taken into consideration for ascertaining whether there was undue delay in recording the prosecution, or as to whether it was the accused who was responsible for the delay.

In para 11 of the first judgement, sub-para 5 and 6 are relevant and read as under:-

"5. It may be remembered that even the different periods suggested by this Court for closing prosecution evidence in different categories of cases are not unexceptional as could be noted from the two exceptions provided therein. They are :

"(iv) But if the inability for completing the prosecution evidence within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (i) to (iii)

(v) Where the trial has been stayed by orders of the court or by operation of law, such time during which the stay was in force shall be excluded from the aforesaid period for closing the prosecution evidence. The above directions will be in addition to and without prejudice to the directions issued by this Court in "Common Cause" A Registered Society v/s Union of India {J.T. 1996(4) SC 701} as modified by the same Bench through the order reported in "Common Cause" A Registered Society v/s Union of India {J.T. 1996(6) SC 775}."

6. We are inclined to state by way of clarification that the discretion of the courts in granting further time (exercisable "for very exceptional reasons to be recorded and in the interest of justice" as for Direction No.(iii) above) can be imported in respect of Direction No.(i) as well."

4. The first decision referred to hereinabove came up for clarification before the Supreme Court resulting in the judgement at S.No. 2 referred to hereinabove.

I am conscious that Justice M.B.Shah, J. has delivered a judgement which may be said to be a differing judgement, and constitutes a minority decision.

In para 30 of the said decision, it has been observed that, "The accused may get acquittal or

discharged on the ground of delay without considering the fact that in number of cases delay might be because of large number of cases pending before the Court and sufficient strength of judges to cope up with the workload. Delay only due to congestion of court calendar, unavailability of Judges and on occasions non-availability of the counsel for either partly or any other circumstances beyond the control of prosecution cannot be a ground for closure of prosecution evidence."

[emphasis supplied]

Para 33 of the said second judgement referred to hereinabove quotes from an earlier Supreme Court decision in the case of Abdul Rehman Antulay v/s R.S.Nayak [J.T. 1991(6) SC 431], and quotes the Constitution Bench of the Court as under :-

"Some offences by their very nature e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public servants and high public officials take longer time for investigation and trial. Then again, the workload in each court, district, region and State varies. this fact is too well known to merit illustration at our hands. In many places, requisite number of courts is not available. In some places, frequent strikes by members of the bar interfere with the work schedules. In short, it is not possible in the very nature of things and present day circumstances to draw a time limit beyond which a criminal proceeding will not be allowed to go. Even in the USA, the Supreme Court has refused to draw such a line. It is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings. It is not necessary to do so for effectuating the right to speedy trial. We are also not satisfied that without such an outer limit, the right becomes illusory."

[emphasis supplied]

5. In the broad principles laid down by the Supreme Court in the aforesaid two decisions are applied to the facts of the case, the following conclusions emerge :-

The present applicants - accused do not plead any delay working to their prejudice subsequent to April 1997, by implication, accepting responsibility for the

subsequent delay upon themselves. However, the delay from the date of framing of the charge, that is to say, from 1st December 1993 upto April 1997 has been factually dealt with by the Special Judge.

The Special Judge has rightly appreciated the principles laid down in the case of Raj Deo Sharma [supra] and has also taken note of the fact that while deciding the factual question of delay and the responsibility therefor, "a realistic and practical approach should should be approached instead of being technical one".

The Special Judge has taken note of the fact that, after the charge was framed, the matter was sent to the office (i.e. the Criminal Department of the City Civil & Sessions Court) and was placed for regular hearing only in April 1997. In this context, learned counsel for the petitioner submits that, transferring the matter to the Criminal Department instead of retaining the same on the Board of the Special Judge is a practice not contemplated by the Criminal Procedure Code, nor by the Ahmedabad City Civil Court Rules. In this context, the learned Special Judge has observed that, after the charge is framed, as per the practice and procedure followed by the City Civil & Sessions Court, at Ahmedabad, the case goes to the Criminal Department, where it remains until as per the seniority according to its number, it will be placed for trial before the Special Judge. The Special Judge has noted on the factual aspect that, in the relevant period between 1993 to April 1997, there was only one Special Judge dealing with the ACB matters. Further more, the Presiding Judge as a Special Judge at the relevant time was elevated (one by one in succession) to the High Court. Thus, the Presiding Judge who framed the charge was elevated to the High Court, his successor was also elevated to the High Court and so on. Thus, the Special Judge specially authorised to deal with the ACB matters was only one, who had to deal with matters under the Prevention of Corruption Act, but was also required to deal with other civil, as also administrative matters. The crux of the matter is not whether the practice followed by the Ahmedabad City Civil & Sessions Court is appropriate or not, but the fact remains that even if this practice had not followed and the matter had been placed for regular hearing, it would not have been taken up for recording evidence either because the Special Judge was not available, or because he was otherwise engaged in other judicial work, and in any case, the matter would have been adjourned in due course. Certainly under these

circumstances, it could not be said that the delay was on account of the conduct of the accused, but at the same time, it is not possible to say that this delay was on account of any inactivity or indolence on part of the prosecution, particularly when on the facts of the case it is found that, for the period in question namely, from the date of framing charge upto April 1997, the prosecution had no opportunity to produce witnesses and record their evidence.

7. I am therefore inclined to accept the reasoning of the learned Special Judge and uphold the rejection of the accused's application at exh.18.

8. This revision is therefore dismissed. Rule discharged. Interim relief stands vacated.

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